No. 12938

United States
COURT OF APPEALS
for the Ninth Circuit

UNION SULPHUR AND OIL CORPORATION,
a Corporation,
Appellant,

vs.

W. J. JONES & SON, INC., a Corporation,
Appellee.

BRIEF OF APPELLANT UNION SULPHUR AND OIL CORPORATION

Upon Appeal from the District Court of the United States for the District of Oregon.

KRAUSE, EVANS & KORN,
GUNTHER F. KRAUSE,
Spalding Building,
Portland, Oregon,
Proctor for Appellee.

WOOD, MATTHIESSEN & WOOD,
ERSKINE B. WOOD,
1310 Yeon Building,
Portland 4, Oregon,
Proctors for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-51

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JURISDICTION

This is an appeal from a final decree entered by the District Court in a cause in admiralty. Therefore this Court has jurisdiction of the appeal.

STATEMENT OF THE CASE

This case involves the right of a shipowner to recover from a stevedore company employer, by way of indemnity or contribution, amounts which the shipowner has had to pay to an injured longshoreman. The appeal is based upon an acceptance of the trial court's findings of fact, and only a question of law is involved.

Allan Marshall, a longshoreman working in the employ of W. J. Jones & Son, Inc., the Appellee, was injured aboard the S.S. HERMAN FRASCH, a vessel owned and operated by the Appellant, Union Sulphur and Oil Corporation. Marshall filed a libel in rem against the vessel. Appellant, as shipowner and claimant, impleaded Appellee, the stevedore company, for full indemnity or contribution for any amount that Appellant might have to pay the injured longshoreman. At the outset of the trial in the District Court, and with the consent of Appellee, Appellant settled libelant's claims for $6,110. The case proceeded to trial upon the sole issue of Appellant's right to indemnity or contribution from Appellee.

The facts are fully and accurately set forth in the trial court's Findings of Fact (Apostles 14-18), and indeed this appeal is taken upon the Findings of Fact and Conclusions of Law alone. Therefore, Appellant adopts the Findings of Fact as set forth in the Apostles, pages 14 to 18, as the statement of the case.

The trial court found that the vessel's ladder was unseaworthy, due to a defective weld. The trial court

also found that Appellee, the stevedore company, was negligent in using the ladder for purposes it was not designed or intended for, and placing excessive strains upon it which further weakened it. The ladder, although having a poor weld, was sufficiently strong to be used as a ladder and could have safely supported men climbing up and down, including Marshall, except for the further weakening caused by Appellee's nelgigence. Therefore the unseaworthiness would not have caused the accident but for the subsequent negligence and improper use of the ladder by the Appellee (Findings of Fact IV, V, and VI, Ap. 16-18).

On these facts the trial court concluded that the longshoreman's injuries were caused by joint and concurrent negligence of Appellant and Appellee (Conclusions 3, 4, Ap. 19). But the trial court denied Appellant's claim for indemnity or contribution from Appellee.

This appeal therefore presents the question whether a shipowner is entitled to indemnity or contribution against a stevedore company which improperly and negligently misuses the ship's equipment, which although defective could have been safely used for the purpose intended except for the subsequent active negligence of the stevedore.

POINTS ON APPEAL
ASSIGNMENTS OF ERROR

Appellant's Assignments of Error and Points on Appeal are set forth in the Apostles pages 25, 26 and 32, 33. In essence, the Assignments of Error and Points on Appeal are to the effect that, upon the facts as found by the trial court, the court should have granted Appellant full indemnity against Appellee, or in the alternative, at least contribution. As the Assignments and Points are somewhat repititious, for the convenience of the Court we do not set them all out here, but include them all in the Appendix to this brief. And we ask that we be permitted to discuss them all under the headings of numbers 3 and 4 of the Points on Appeal.

I.

On the facts as found by the trial court, Appellant is entitled to full recovery over and against Appellee of the amount paid to libelant, by way of full indemnity and under the decision of this Court in U. S. v. Rothschild Stevedoring Co., 150 A.M.C. 1332, 183 F. 2d 181.

ARGUMENT

We believe that under the decision of this Court in *U. S. v. Rothschild Stevedoring Co.,* 1950 A.M.C. 1332, 183 F. 2d 181, appellant is entitled to full indemnity from appellee.

In the Rothschild case both the shipowner (the United States) and the stevedore company (Rothschild) were negligent (183 F. 2d at p. 182). The vessel furnished a defective winch, and for this the shipowner was held liable to the injured longshoreman. The stevedore company was negligent in using the winch after it was known to be defective. The stevedore's negligence was subsequent in time to that of the shipowner. This Court quoted the following from *The Mars,* 9 F. 2d 183, 184:

> "It may be thought that this was a proper case for dividing damages. I think not. * * * I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second."

This Court granted the shipowner full indemnity over against the Rothschild Stevedoring Company.

The present case is very close upon the facts to the Rothschild case, and in some respects is an even stronger case for the shipowner. In both cases the vessel had defective equipment. In both cases the defective equipment alone would not have caused the injury. In both cases the stevedore's negligence, subsequent in time, brought about the accident.

However, in the Rothschild case we understand the winch was defective and absolutely unsafe for the pur-

pose intended. In the present case, while the ladder had a defective weld, nevertheless when the vessel was turned over to the stevedore company the ladder "was sufficiently strong to support men heavier than libelant climbing up and down and using the ladder, and that the ladder could have been used by men climbing up and down it, and the accident would not have occurred except for a further weakening of the ladder caused by the impleaded respondent as hereinafter set forth" (Finding IV, Ap. 16, 17). This seems to make the present case an even stronger one for the shipowner than the Rothschild case.

Furthermore, in the Rothschild case the negligence of the stevedore company consisted of using the defective ship's appliance for the purpose intended. That is, they used the winch as a winch. But in the present case the stevedore company's negligence consisted of using the ladder to obtain leads to the drag lines. This was an entirely improper use of the ladder which put heavy and excessive strains upon it and weakened it (Finding V, Ap. 17). Therefore the stevedore was guilty of even more serious negligence here than in the Rothschild case.

We submit that here, as in the Rothschild case, and in *The Mars,* appellant's negligence was merely a pre-existing condition, and the subsequent active negligence of appellee should be considered the real proximate cause of the accident.

It is true that the trial court made "Findings" that the negligence of appellant and appellee was "joint and concurrent". However, while stated under the "Find-

ings", this is really a conclusion of law drawn from the basic facts. Therefore this Court is free to determine for itself whether the negligence of both parties is joint and concurrent, or whether the subsequent negligence of appellee is the real proximate cause. See *Barbarino v. Stanhope SS Co.,* 151 F. 2d 553; *Bonnewell v. U. S.,* 170 F. 2d 411.

Here the ladder furnished by the ship, if used as a ladder, was sufficiently strong and could have been used safely and would have caused no injury. The subsequent and active negligence of appellee in subjecting the ladder to improper use brought about the accident. We submit that the shipowner should recover full indemnity under these circumstances.

II.

On the facts as found by the trial court, if Appellant should not be entitled to full indemnity, then in the alternative, Appellant is at least entitled to Contribution from and against Appellee.

ARGUMENT

Both the ship and the stevedore company were negligent. If appellant is denied full indemnity, then appellant is entitled at least to contribution to the extent of one half the amount it has had to pay the injured longshoreman.

The usual rule in admiralty, where two parties are negligent, is that each shall pay one half of the damages.

Following this, where an employee of a stevedore or ship repair firm is injured aboard ship through the negligence of both the ship and the employer, the weight of authority has allowed the shipowner contribution against the stevedore or ship repair firm to the extent of one half the damages paid by the shipowner to the injured man.

Barbarino v. Stanhope SS Co. (CCA 2d), 151 F. 2d 553.

Lascovitch v. S.S. SAMOVAR (N.D. Calif.), 1947 A.M.C. 1046; 72 F. Supp. 574.

Coal Operators Gas Co. v. U. S. (E.D. Penn.), 1948 A.M.C. 127; 76 F. Supp. 681.

Christon v. U. S. (E.D. Penn.), 1948 A.M.C. 953.

Calvino v. Pan Atlantic SS Corp. (S.D.N.Y.), 1940 A.M.C. 289; 29 F. Supp. 1022.

Severn v. U. S. (S.D.N.Y.), 1946 A.M.C. 1468; 69 F. Supp. 21.

Green v. W. S. A. (E.D.N.Y.), 1946 A.M.C. 874; 66 F. Supp. 393.

Brosnan v. A. P. L. (S.D.N.Y.), 1943 A.M.C. 526.

The Tampico (W.D.N.Y.), 1942 A.M.C. 955; 45 F. Supp. 174.

Rederii v. Jarka Corp. (D. of Maine), 1939 A.M.C. 476; 26 F. Supp. 304.

cf. *Portel v. U. S.* (S.D.N.Y.), 1949 A.M.C. 487; 85 F. Supp. 458 (Contribution of 60% allowed).

And see *American Stevedores v. Porello* (U.S. Sup. Ct. 1947), 330 U.S. 446; 91 L. Ed. 1011.

And cf. *Westchester Lighting Co. v. Westchester Estates,* 278 N.Y. 175; 15 N.E. 2d 567.

In passing upon this question, the courts have had to consider the effect of the Longshoremen's and Harbor Workers' Act, 33 U.S. Code § 901 et seq. It has been contended that section 5 of the Act, making the employer's liability for compensation exclusive of any other liability to the employee, precluded the shipowner from recovery over against the stevedore for contribution. But the Act was never intended to affect the rights between the employer and third parties such as the shipowner. Therefore the courts generally have rejected this contention. In doing so, the courts have drawn on the clear analogy of *The Chattahoochee,* 173 U.S. 540; where the Supreme Court held that the Harter Act, although precluding a direct recovery by cargo against the carrying vessel, does not preclude the non-carrying vessel recovering over against the carrying vessel one half of the damages which the non-carrying vessel has had to pay cargo.

Holding the Longshoremen's Act is no defense to the shipowner's claim for contribution, Judge Peters said, in *Rederii v. Jarka Corp,* supra:

> "The respondent contends that by the terms of the Act its liability for damages on account of an injury is limited to a person proceeding under the Act, and that as this libel is an action for or on account of the injury it cannot be sustained for that reason.
>
> "The language of the Act is not appropriate to the meaning respondent argues for. The liability excluded by the language is other liability of the employer to the employee, or anyone standing in his shoes, for damages 'on account of such injuries'.

"This is an action by one, not to recover damages for or on account of the accident, but to recover damages that he had to pay the injured person or on account of the accident to him.

"It is alleged to be a case of joint tort feasors, one having paid damages seeking indemnity or contribution from the other.

"If the longshoreman's right of action against the vessel was not taken away by the Act he can libel the vessel as before, and an owner of the vessel who is obliged to pay damages has the same rights and remedies against other persons as he had before the Act was passed.

"A case very much in point is Westchester Lighting Company vs. Westchester County Small Estates Corporation, 278 N.Y. 175, 15 N.E. (2d) 567. This case arose under the New York statute which has language nearly identical in this matter with the Federal statute." 1939 A.M.C. at pp. 477, 478; 26 F. Supp. at p. 305.

Likewise, in *The Samovar,* supra, Judge Mathes said:

" . . . the Longshoremen's and Harbor Workers' Compensation Act alters only the liability of the employer to the employee . . . and does not affect the conventional relationship between the employer and other tort-feasors.

* * * * *

"If, by reason of limitation of liability or other statutory immunity, a libellant cannot recover directly from one of two joint tort-feasors, he may proceed against one for the full amount of his damages, and the latter would have a right of contribution for one half from the other tort-feasor (Aktieselskabet Cuzco vs. The Sucarseco, 294 U.S. at 400, 401, 1935 A.M.C. 412; The Chattahoochee, 173 U.S. at 540)," 1947 A.M.C. at 1064, 1065; 72 F. Supp. at 588, 589.

Similarly, nearly all of the other cases cited above, which allow the right of contribution, have stated that the Longshoremen's Act does not give the stevedore immunity from suit by the shipowner.

DISCUSSION OF CASES CITED BY TRIAL COURT

The trial court denied indemnity or contribution "upon authority of *American Mutual Liability Ins. Co. v. Mathews,* 182 F. 2d 322, 2 Cir., and in conformity with *Johnson v. U. S.,* 79 F. Supp. 448 (1948)" (Ap. 19). We shall therefore discuss these cases.

Johnson v. U. S. was a decision of the District Court for Oregon, by Judge McColloch, which Judge Solomon was bound to conform to as a prior decision of the same court.

In Judge McColloch's brief opinion in the Johnson case, he refers to the development of compensation acts to relieve the injustice to injured workmen and their dependents who formerly were left to common law legal remedies. And he seems to feel that allowing the shipowner to sue the stevedore would "open a hole in a dike" and endanger the system of compensation acts.

But the shipowner's right to contribution against the stevedore employer has no effect whatever on the employee's right to compensation if he elects to receive it. The compensation acts are well established in our system. Their primary purpose was to afford greater rem-

edies to the workmen. But they were not intended to give the employer an immunity from suit by third parties.

We do not think it can be of benefit to the injured workmen to let the stevedore-employer escape entirely free in these cases where the employer has been guilty of negligence contributing to the injury.

The Johnson case is against the great weight of authority of many cases which have held that the Longshoremen's Act does not give the stevedore immunity from contribution. At the time the Johnson case was decided, it was supported only by dictum, without discussion, in *Frusteri v. U. S.,* 76 F. Supp. 667 (E.D.N.Y. 1947).

Subsequently, even this dictum was destroyed as authority by the decision of the Court of Appeals for that Circuit in *Rich v. United States* (Second Circuit), 177 F. 2d 688; 1949 A.M.C. 2079, where it was expressly held that the Longshoremen's Act does not preclude the shipowner from recovering over against the injured man's employer.

We also point out that the Johnson case has in effect been overruled by this court's decision in *U. S. A. v. Rothschild Stevedoring Co.,* 1950 A.M.C. 1332; 183 F. 2d 181. For in that case this court allowed the shipowner to recover full indemnity against the stevedore employer, notwithstanding the Longshoremen's Act. If the Longshoremen's Act does not give the stevedore immunity from full indemnity, then surely it does not give immunity from contribution.

The other case cited by the trial court is *American Mutual Liability Ins. Co. v. Matthews,* a decision of the Second Circuit, 182 F. 2d 322; 1950 A.M.C. 1272. We wish to discuss the Matthews case from two separate points of view. First, we say it is wrong, and does not represent the law of this Circuit. Second, we say it is clearly distinguishable from the present case, and in fact supports the right to contribution under the facts of the present case.

First — Matthews Case Wrong

In the Matthews case a longshoreman was injured aboard ship through the breaking of a defective guy rope. The ship was negligent in furnishing the defective rope. The stevedore company was negligent in not inspecting the rope before using it. The trial court had allowed the shipowner (and its insurer suing under right of subrogation) contribution against the stevedore employer of one half the amount that the shipowner had to pay the injured man. The Court of Appeals reversed, denying any right of contribution under the facts of the case.

The opinion goes upon a strict technical analysis of the right of contribution between joint tort-feasors. It says there can be no contribution between joint tort-feasors unless there is a common liability, and says that because of the Longshoremen's Act there is no tort liability of the stevedore to the injured employee, and hence no liability in common with the ship.

This restriction of the right of contribution on strict

technical grounds, against the previous great weight of authority, has been criticized and rejected in a recent decision by the Third Circuit.

Baccile v. Halcyon Lines (Third Circuit 1951), 1951 A.M.C. 542; 187 F. 2d 403.*

In this decision the Third Circuit points out that such a strict and technical application is not in keeping with the admiralty law, where the right of contribution between wrongdoers has been so long recognized as a rule of fairness.

> " . . . literal adherence to concepts derived from the common law would not seem appropriate in a system of jurisprudence that has developed rules according to its own sense of right, even contrary to those of the common law. The admiralty law early recognized that contributory negligence was not necessarily a bar to recovery, and it devised the 'moiety rule' to satisfy a singular desire 'for a better distribution of justice between mutual wrongdoers.' And where comparative negligence is said to be 'not unknown', the requirement of common liability cannot be deeply ingrained, for the equity of the one is inconsistent with the concept of liability

*Note—In this case the Third Circuit adopted the novel device of allowing the right of contribution, limited however to the amount that the employer would have had to pay as compensation. The difficulty here is that this amount would usually be in controversy. The judge or jury may have to arrive at two figures of compensation under different standards in the same trial—namely the injured man's damages for negligence, and, for purpose of contribution, the amount he would have received as compensation. In law actions before a jury this could lead to considerable confusion. Another objection is that the amount of compensation is usually determined administratively, by a deputy commissioner under the Act, but, as the injured man has elected to sue, there is nothing before the deputy commissioner. In some cases the amount of compensation under the Act might be far in excess of half the damages awarded for negligence, in other cases less than half. Where the amount of compensation is in excess of half the damages, the employer would bear more than half the damages, although the ship was equally negligent. We submit that the usual rule of allowing contribution of one half is fair to both parties and far more practical.

in solido attaching to the other." 1951 A.M.C. at pp. 544, 545; 187 F. 2d at 404, 405.

The Matthews case is also criticized in a comment "Contribution in Admiralty Restricted", December 1950 Stanford Law Review, Vol. 3, page 137.

> "On the majority's approach the case was closed. The shipowner was denied relief since the situation failed to fit any of the existing categories of recovery over. The result is a logical but unfortunate by-product of a statute with an entirely different purpose. True, the shipowner and the employer are no longer under a common liability in the strict sense, but they are both under a liability for the same injury. And, in effect, the shipowner has discharged the employer's liability to pay compensation, since the employee cannot have both recoveries. The element of fault on both sides is also present. Allowing contribution between wrongdoers is nothing more than a recognition of simple fairness. For a court to deny recovery over unless there is 'common liability' may be a wooden application of the rule in a new and different situation." 1950 Stanford Law Review, Vol. 3, p. 140.

As pointed out in this article and in the Baccile case (supra) it is not fitting for the admiralty law to deny the rigth of contribution on such strict technical grounds. Where the shipowner and stevedore are both negligent, they are both mutual wrongdoers. Each should pay a share of the damages, in accordance with usual admiralty principles. It is manifestly unfair to place the entire loss on the shipowner, and relieve the stevedore company, whose negligence has contributed to the accident, from paying any part of the loss.

The Matthews case is also contrary to the decision of this court in the Rothschild case, and therefore does not represent the law for this Circuit. No better authority for this statement can be cited than the Court which decided the Matthews case. See *Slattery v. Marra Bros.* (2 Cir. 1951), 1951 A.M.C. 183; 186 F. 2d 134.

After referring to its decision in the Matthews case, the Second Circuit says:

> "The decision of the Ninth Circuit in United States v. Rothschild International Stevedoring Co., 1950 A.M.C. 1332, 183 F. 2d 181, can indeed hardly be reconciled with ours, for we can see no more reason to hold that it was a breach of the stevedore's contract with the ship to use a winch known to be defective than to use a defective stay." 1951 A.M.C. at p. 190; 186 F. 2d at 139.

The United States Supreme Court has never directly passed upon the point involved, but it touched very closely on the question in *American Stevedores v. Porello* (1947), 330 U.S. 446; 91 L. Ed. 1011.

That case involved the construction of an ambiguous written contract of indemnity between the shipowner and the stevedore. But in discussing the various possible interpretations, the Supreme Court referred to the "usual rule in admiralty" as requiring each joint tort-feasor to pay a moiety of the damages. And the court then said that if the written contract did not apply to the case, then the district court "would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law" (330 U.S. p. 458; 91 L. Ed. pp. 1020, 1021). It seems clear from the

context that in referring to "applicable rules of admiralty law" the Supreme Court was referring to its preceding statement that the usual rule in admiralty is for each joint tort-feasor to pay a moiety of the damages.

Now the Supreme Court had before it a case where the longshoreman had been injured by negligence of both the shipowner and the stevedore employer. The shipowner was seeking indemnity from the stevedore under a contract. But the Supreme Court said that if the contract was inapplicable, then the district judge should fix the responsibility between the two "under applicable rules of admiralty law," referring to the rule of division of the damages.

This was not dictum, for the Supreme Court was sending the case back with instructions to apply the principles announced.

Therefore we believe this decision actually states that if the shipowner and stevedore are jointly negligent, and no contract is applicable, the stevedore is liable for a moiety of the amount that the shipowner is required to pay the stevedore's employee.

The point we make here has been perhaps more clearly stated by Judge Kirkpatrick in *Coal Operators Gas Co. v. U. S.* (E.D. Penn. 1947), 1948 A.M.C. 127; 76 F. Supp. 681. Although somewhat long, we quote from that opinion:

> "A more serious objection is that stated in the opinion of the Circuit Court of Appeals in Porello v. United States, 2 Cir., 153 F. 2d 605, 607, as follows: 'For a right of contribution to accrue between tort-

feasors, they must be joint wrongdoers in the sense that their tort or torts have imposed a common liability upon them to the party injured. A.L.I. Restitution, § 86; 13 Am. Jur., Contribution, § 51. Since the libellant has no cause of action against his employer, the United States can claim no contribution on the theory of a common liability which it has been compelled to pay.' The Porello case, however, was appealed and the Supreme Court opinion, 330 U.S. 446, 67 S. Ct. 847, 854, contains one statement which I cannot read in any other way than as overruling the position taken by the Circuit Court of Appeals upon this point. Justice Reed was discussing the effect of a contract of indemnity between the employer and the shipowner, and said that on the record the contract was ambiguous and, for that reason, the Supreme Court ruled that the case should go back to the District Court for an interpretation. The Supreme Court suggested that one possibility was that the District Court might find that the contract of indemnity had to do only with a case where the employer's negligence was the sole cause of the injury, in which event it would have no bearing on the case. Then the Court said, 'If the District Court interprets the contract not to apply to the facts of this case (and the facts of the case, like the present one, were an injury to an employee caused by the joint negligence of employer and shipowner) the court (that is, the District Court) would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law', and just above the Court had stated that the admiralty rule recognized contribution between joint tort-feasors. Now what the Supreme Court said was not dictum. The Supreme Court was remanding the case to the District Court with instructions and in the sentence quoted was telling the District Judge that, absent the contract of indemnity, he would be free to apply the admiralty rule of contribution. The Circuit Court of Appeals had squarely ruled that there could be no

contribution and the Supreme Court, although it did not mention the position of the Circuit Court of Appeals, certainly must have intended to overrule it.

"I think that the decision of the Supreme Court in the Porello case makes it clear that the right of contribution exists in a case of this nature," 76 F. Supp. 682, 683.

To summarize, then, the Matthews case is in conflict with the law of this Circuit as announced in the Rothschild case; it has been rejected by the Third Circuit; it is contrary to the great weight of District Court decisions from other Circuits; and it appears to be contrary to what the U.S. Supreme Court has indicated the law to be in the Porello case. It is also out of accord with general admiralty principles which are based on fairness. Therefore we submit it should not be followed by this Court.

SECOND — MATTHEWS CASE DISTINGUISHED....

Even if the Matthews case is accepted as good law, it does not preclude recovery in this case.. On the contrary, a close analysis of the Matthews decision shows that it supports the shipowner's right to contribution under the facts of the present case.

The facts of the Matthews case must be kept clearly in mind. The longshoreman was injured because of a defective guy rope. The defect was patent. The shipowner was negligent in supplying the defective rope. The only negligence of the stevedore was in using the rope without making an inspection. The ship had furnished the rope to be used for that very purpose.

The Court said that the ship and stevedore were not joint tort-feasors, because they were not under a common tort liability to the injured longshoreman, since the Longshoremen's Act abolished the stevedore's direct tort liability to his employee for damages. Therefore the Court said the shipowner could have "no right to contribution *based on the theory that they were joint tort-feasors.*"

But the Court then discussed another right which the shipowner might have—namely a right of indemnity based upon an implied contract by the stevedore to do the work properly. The Court recognized that when a stevedore undertakes to discharge a vessel, there is an implied undertaking to do the work properly. If the stevedore, in violation of this obligation, does not exercise due care in performing its work, and is negligent, then it has breached a duty to the shipowner. And in that case, it may be liable to the shipowner for all or part of the damages the shipowner has to pay a longshoreman injured by such negligence on the part of the stevedore-employer.

The Court refers to its prior decision in *Rich v. United States,* 177 F. 2d 688; and to *Westchester Lighting Co. vs. Westchester Estates,* 278 N.Y. 175, as being such cases.

Then the Court concludes that in the case before it, the stevedore did not violate any duty to the shipowner. For the shipowner had furnished the rope to be used, and all the stevedore did was to use the rope for the very purpose for which it was furnished by the ship. And the

Court said it would be unreasonable to imply a promise by the stevedore to inspect the rope which the ship furnished to the stevedore for use. Therefore, the Court said it could "find no contractual basis for indemnity or contribution".

Thus it is clear that even the Matthews case recognizes the duty of the stevedore to use care in the work, and the liability of the stevedore to indemnify the ship in whole or part where the stevedore has been guilty of some active negligence in performing the work.

Let us now again look at the facts in the present case. Appellee, the stevedore, was bound to use due care in the work. It owed an obligation to Appellant, the shipowner, to exercise due care in its use of the ship's appliances. It violated this obligation. It made improper use of the ladder and subjected it to excessive strains, in violation of good stevedoring practices (Finding V, Ap. 17, 18). It did not merely use the ladder for the purpose intended (as the stevedore in *Matthews* merely used the rope for the purpose intended), but it *negligently* used the ladder *for purposes not intended* (Finding V, Ap. 17). Therefore Appellee in the present case clearly violated a duty owed to the Appellant. Consequently, as clearly indicated by the Matthews case, the stevedore is liable to indemnify the shipowner for the damages suffered as a result of the stevedore's active negligence.

Our interpretation of the Matthews case is made plain upon consideration of the same Court's decision in *Barbarino v. Stanhope SS Co.* (CCA 2d 1945), 151 F. 2d 553.

In the Barbarino case a longshoreman was injured aboard ship by a falling boom. The Court of Appeals assumed, for purpose of argument, that the boom fell because a bolt, furnished by the ship, was defective and broke. But the Court of Appeals held that the ship would have a right of contribution against the stevedore if the stevedore also was negligent in the manner it did the work. The Court therefore reversed a decree exonerating the stevedore, and sent the case back to determine if the stevedore was negligent.

Thus, in the Barbarino case, the Second Circuit clearly held that a negligent shipowner has a right of contribution, under general admiralty principles, against a stevedore employer whose negligence in doing the work has contributed to the injury. This makes it clear that application of the Matthews case must be limited to those situations where the only negligence asserted against the stevedore is its failure to inspect an appliance furnished by the vessel for use.

The Barbarino case is a clear authority supporting the right to contribution in the present case, where the stevedore was actively negligent in making improper use of the vessel's equipment.

We believe the Barbarino case is still the law of the Second Circuit, as it was not referred to in the Matthews case, and has been cited frequently by the Second Circuit. The Barbarino case was also cited with apparent approval by the Supreme Court in the Porello case (330 U.S. 458; 91 L. Ed. 1020) and by this Court in the Rothschild case (183 F. 2d 183; 1950 A.M.C. 1334).

ALLOWING THE SHIPOWNER CONTRIBUTION FROM THE STEVEDORE IS IN ACCORD WITH THE GENERAL ADMIRALTY LAW GOVERNING RELATIONS BETWEEN THE SHIP AND STEVEDORE

Before closing this brief we desire to give a few examples of the general law governing relations between the ship and the stevedore.

It is well settled that the stevedore is liable to the shipowner for damage done to the vessel itself as a result of the stevedore's negligence.

Benjamin Williams (D.C. Mass.), 1947 A.M.C. 1547.

Maltran (S.D.N.Y.), 1946 A.M.C. 306.

This shows that the stevedore owes a duty direct to the shipowner to use due care in performing the work.

And where the ship itself is damaged as the result of negligence on the part of the ship and also negligence on the part of the stevedore, then the shipowner is entitled to recover half the damage from the stevedore.

Marouko Pateras (S.D. Ala.), 1944 A.M.C. 525, 53 F. Supp. 315.

In that case the vessel's mast was bent, due to the vessel furnishing a defective shroud, and the stevedore placing excessive strain upon it. The shipowner recovered half damages from the stevedore.

Suppose in that case the mast had fallen and injured a longshoreman, who recovered damages against the

ship. It would be ridiculous to say the ship could recover from the stevedore half the property damage to the mast, but not half the damages it had to pay the longshoreman. Obviously, the stevedore would be liable for half of both damages.

And in the present case, the stevedore also had a liability to the ship for the damage done to the ship's ladder, although that is not involved in this litigation. But the point emphasizes that the stevedore has violated a duty to the ship.

Where the ship and stevedore are both negligent, and property of a third party is damaged, then each is liable for one half the damages.

> *Smith v. Nicholson Transit* (W.D.N.Y.), 1941 A.M.C. 909.

And where a stevedore company was negligent in placing the hatch boards on a vessel, and at another port a longshoreman was injured thereby, the shipowner was entitled to recover in full from the stevedore for the amount the shipowner had to pay the injured longshoreman.

> *The Sagadahoc* (C.C.A. 9th), 1929 A.M.C. 865; 32 F. 2d 886.

Now these principles are all well known and settled. We merely cite them to illustrate the general law governing the relations between shipowner and stevedore. They show clearly that the stevedore has a duty to the shipowner to use due care, and that the stevedore is liable to the shipowner for its damages resulting from

the stevedore's negligence; and that where both ship and stevedore are both negligent the shipowner may recover one half its damages from the stevedore. Consistent with these principles, the ship is entitled to indemnity in full for the amount it has had to pay the stevedore's employee, when the accident has been caused by the stevedore's negligence; and to contribution of one half when the accident is caused by joint negligence of both the ship and the stevedore.

CONCLUSION

Here is a case where the ship's ladder, although defective, was sufficiently strong for the purpose and could have been used safely as a ladder by the longshoremen. The stevedore company, in violation of good stevedoring practices, and in violation of its duty to the ship, negligently used the ladder for other purposes, so weakening it as to bring about serious injuries to its employee. Under such circumstances it would be manifestly unfair to visit the entire loss on the shipowner and let the stevedore company off entirely.

We submit that this case is governed by *U. S. A. v. Rothschild Stevedoring Company,* and that Appellant should be granted full indemnity against Appellee, based on Appellee's subsequent active negligence.

If, however, the Court should not allow full indemnity, the Appellant is at least entitled to contribution of one half the damages. This right is based on fairness, is in accordance with the general principles of admiralty law, and is supported by the great weight of authority.

Respectfully submitted,

WOOD, MATTHIESSEN & WOOD,
ERSKINE B. WOOD,

1310 Yeon Building,
Portland 4, Oregon,

Proctors for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR

I.

The trial court erred in denying claimant and petitioner recovery from and against impleaded respondent, W. J. Jones & Son, Inc., by way of indemnity or contribution for the amount paid by claimant and petitioner to libelant in settlement of libelant's claims.

II.

The trial court erred in ruling as a matter of law, that on the facts as found by the trialcourt claimant and petitioner was not entitled to recovery against impleaded respondent, W. J. Jones & Son, Inc.

III.

The trial court erred in ruling as a matter of law, although the impleaded respondent was guilty of joint and concurrent negligence which proximately contributed to libelant's injuries, claimant and petitioner was not entitled to indemnity or contribution over and against impleaded respondent.

IV.

Claimant and petitioner does not allege any error with respect to the trial court's findings of fact but claims that the court erred in failing to allow claimant and petitioner's demand for indemnity or contribution from and against impleaded respondent on the basis of the facts as found by the trial court.

STATEMENT OF POINTS ON APPEAL

1. The trial court, having found as a fact that appellee was negligent and that such negligence proximately caused and contributed to libelant's injuries, and that libelant would not have been injured except for appellee's negligence, should have granted appellant full recovery against appellee by way of indemnity.

2. The trial court found as a fact that appellee negligently subjected the ladder on appellant's vessel to improper use, and that this negligence caused and contributed to libelant's injuries, and that libelant would not have been injured except for such negligence on the part of appellee. On these facts appellant is entitled to full recovery against appellee by way of indemnity.

3. On the facts as found by the trial court, appellant is entitled to full recovery over and against appellee of the amount paid to libelant, by way of full indemnity and under the decision of this Court in U. S. v. Rothschild Stevedoring Co., 1950 A.M.C. 1332, 183 F. 2d 181.

4. On the facts as found by the trial court, if appellant should not be entitled to full indemnity, then in the alternative, appellant is at least entitled to contribution from and against appellee.